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## Negotiated Justice and the Goals of International Criminal Tribunal

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# **Negotiated Justice and the Goals of International Criminal Tribunals**

*With a Focus on the Plea-Bargaining Practice of the ICTY and the Legal Framework of the ICC*

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## **I. Introduction**

After initially rejecting negotiated outcomes as incompatible with its broad mandate, the International Criminal Tribunal for the former Yugoslavia (ICTY) eventually amended its Rules of Procedure and Evidence to add plea-bargaining to its procedural toolbox. Furthermore, the normative framework of the International Criminal Court (ICC) also allows for the possibility of concluding plea agreements which avoid the proceedings on the merits. These possibilities raise the question of whether negotiated outcomes in criminal proceedings compromise the goals of international criminal justice, namely the duty to prosecute, the principle of just desert, the establishment of a historical record, and the realization of the victim's interest. Part II of this Article attempts to define plea-bargaining and conducts an overview of the origins of plea-bargaining including its role in the international realm. Part III analyzes the compatibility and desirability of plea-bargaining in light of the purpose and mandate of international criminal tribunals. Finally, Part IV discusses whether the risk of plea-bargaining compromising the goals of international justice can be outweighed by arguments of administrative efficiency.

## **II. Plea-Bargaining**

### **1. An Attempt to Define**

Providing an accurate and comprehensive definition of plea-bargaining is virtually an impossible task given its multitudinous forms of appearance. The practice most commonly consists of a negotiation between the accused and the prosecution - without the participation of a judge competent to decide the case on its merits - resulting in a plea agreement. The accused either concedes certain facts or admits guilt, thus waiving the possibility of being acquitted. The accused also gives up the benefit of having the state bear the burden of proof to establish the

accused's guilt at trial. In return, the prosecutor may reduce or modify the charges (charge bargaining), the sentence (sentence bargaining), or both. Charge bargaining commonly takes two forms: the prosecutor can either reduce or dismiss charges and amend the indictment accordingly. Sentence bargaining on the other hand is typically based on the promise to either recommend a sentence or sentencing range to the judge(s) or not to oppose a request by the accused for a particular sentence.<sup>1</sup>

## 2. Origins and Prevalence of Plea-Bargaining

### a) *The United States: The Cradle of Plea-Bargaining*

To say that plea-bargaining is an institution of the common law system unknown to the continental legal tradition is too much of a generalization. Some common law countries do not use plea-bargaining at all,<sup>2</sup> while other countries with an adversarial legal system, such as England and Israel, place little importance on its role in the judicial process.<sup>3</sup>

Plea-bargaining is far more prevalent, however, in the United States than in any other country.<sup>4</sup> The United States Supreme Court has described plea-bargaining as “an essential component of the administration of justice.”<sup>5</sup> Guilty plea rates of above 90%, and sometimes even 95%, are proof of the extraordinary dominance of plea-bargaining in American

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<sup>1</sup> MARK E. CAMMACK & NORMAN M. GARLAND, ADVANCED CRIMINAL PROCEDURE IN A NUTSHELL 270-272 (Thomson-West Nutshell Series, 2006)(2d ed. 2006); *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 48 (Dec. 2, 2003) (sentencing judgment); *see, e.g.*, Rule 62ter (A) Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, IT/32/Rev. 39 (Sept. 22, 2006) [hereinafter ICTY-RPE].

<sup>2</sup> For example, South Africa.

<sup>3</sup> Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 46-49 (2002).

<sup>4</sup> George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1012-1013 (2000).

<sup>5</sup> *Santobello v. New York*, 404 U.S. 257, 260 (1971).

courtrooms.<sup>6</sup> However, even in countries where plea-bargaining is the primary mode of settling cases, such as the United States, it is used less frequently in the most serious and notorious cases.<sup>7</sup>

b) *Use of Plea-Bargaining: Bruising Continental Legal Sensibilities?*

Even though the American practice of using formal plea agreements does not exist in most civil law countries, a weaker form of negotiated justice can still be found in different European countries.<sup>8</sup> For instance, some procedural laws contain the institution of “confession,” which is an admission of guilt made by the accused during the investigation or the trial. This admission of guilt, however, cannot be equated with a “guilty plea” in the American system. A confession does not relieve the court of its responsibilities to determine whether the confession is credible and supported by corroborating evidence.<sup>9</sup> The accused’s confession is “simply part of the evidence to be considered and evaluated by the court”<sup>10</sup> and has no effect on the adjudication of the case on its merits. In most countries, however, the court does have the discretion to consider a confession as a mitigating factor when assessing the sentence.<sup>11</sup>

While confessions can trigger an effect similar to sentence bargaining, thereby producing a certain convergence between countries with and without plea-bargaining, the idea of charge

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<sup>6</sup> Fisher, *supra* note 4, at 1012-1013.

<sup>7</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 47 (Dec. 2, 2003) (sentencing judgment).

<sup>8</sup> See Françoise Tulkens, *La justice négociée*, in Mireille Delmas-Marty, *PROCÉDURES PÉNALES D’EUROPE* 551-583 (1995) (overview of the elements of negotiated justice (*justice négociée*) in the criminal procedures of continental Europe).

<sup>9</sup> Michael Bohlander, *Plea-Bargaining before the ICTY*, in Richard May et al., *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, 151, 151, 159 (2001).

<sup>10</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶ 7 (Oct. 7, 1997) (separate and dissenting opinion of Judge Cassese).

<sup>11</sup> The Swiss Supreme Court handles confessions as a mitigating factor and accords a so-called “confession discount” (up to 30% reduction of the sentence if the confession is made in an early stage of the proceedings).

bargaining still “bruises continental legal sensibilities.”<sup>12</sup> Charge bargaining contradicts the fundamental purpose of the criminal trial, which is to establish the “material truth,” not simply the truth put forward by the parties’ arguments and evidence.<sup>13</sup> Also, the strict adherence in criminal affairs to the *iura novit curia* principle is incompatible with charge bargaining, which results in a reduction of the charges to a lesser crime.<sup>14</sup>

### 3. Appearance of Plea-Bargaining in the Realm of International Justice

The architects of the procedural framework for the ICTY, ICTR, and ICC all pursued a similar construction plan. They blended accusatorial features of the common law system with elements of the inquisitorial tradition of the civil law system while taking into account the standards of international human rights law.<sup>15</sup> This task was all the more difficult since an appropriate balance between different national legal traditions and values had to be found while taking into account the special mandate and nature of an international trial where the accused are charged with the gravest of all crimes. An analysis of whether plea-bargaining is appropriate in the realm of international justice demonstrates the difficulty in balancing the different legal traditions amidst the goals and nature of international criminal tribunals.

#### a) *Plea-Bargaining at the ICTY*

Initially, the ICTY found that plea-bargaining would be incompatible with its unique mandate and purpose. The judges at the ICTY decided to reject a proposal made by the United

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<sup>12</sup> Mirjan Damaška, *Negotiated Justice in International Criminal Courts*, 2 J. INT’L CRIM. JUSTICE 1018, 1024 (2004).

<sup>13</sup> See Bohlander, *supra* note 9, at 159. In Switzerland the “formal truth” (*formelle Wahrheit*), the facts agreed upon by the parties, is controlling in civil proceedings while in criminal cases the “material truth” (*materielle Wahrheit*) has to be established by the court through the evaluation of the available evidence.

<sup>14</sup> See *id.* at 160.

<sup>15</sup> Helen Brady, *The System of Evidence in the Statute of the International Criminal Court*, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 279, 281 (William A. Schabas & Flavia Lattanzi eds., 1999).



States Government that would have permitted providing immunity to any accused offering substantial cooperation.<sup>16</sup> In February 1994, Judge Cassese of Italy, then President of the ICTY, emphasized the special mandate of the *ad hoc* court:

We have always to keep in mind that this Tribunal is not a municipal court but one that is charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.<sup>17</sup>

It was not until December 2001 that the ICTY adopted plea agreement procedures under Rule 62*ter* ICTY-RPE.<sup>18</sup> This Rule formalized a practice of the court that emerged in different variations and degrees in the cases of *Erdemović*, *Jelisić*, *Todorović*, *Sikirica*, *Došen*, and *Kolundzija*.<sup>19</sup> One explanation for this about-face can be found in the ICTY's growing docket due to the increased arrests of more senior leaders coupled with an upcoming efficiency and completion strategy discussion outlining a tighter schedule for the Tribunal.<sup>20</sup> Also, United States Judge McDonald's replacement of Judge Cassese as President of the ICTY added to the momentum for change, as she was in strong favor of increasing the use of plea-bargaining at the ICTY.<sup>21</sup>

The concept of the guilty plea *per se* is the peculiar product of the adversarial system of the common law which recognises the advantage it provides to the public in minimising costs, in the saving of court time.... This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by

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<sup>16</sup> Michael P. Scharf, *Trading Justice for Efficiency, Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUSTICE 1070, 1073 (2004).

<sup>17</sup> Statement by the President of the ICTY Made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994, *reprinted in* AN INSIDER'S GUIDE TO THE ICTY 649, 652 (Virginia Morris & Michael P. Scharf eds., 1995) (emphasis in the original) [hereinafter Statement by President].

<sup>18</sup> The ICTR has also adopted a similar provision. See Art. 62*bis* ICTR-RPE.

<sup>19</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 46 & n.86 (Dec. 2, 2003) (sentencing judgment).

<sup>20</sup> See S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg. at 1, 3 U.N. Doc. S/RES/1503 (2003) (discussion about the Tribunal's efficiency was launched in 1999 with the initiation of an Expert Group by the Secretary General (see *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, *infra* note 101)).

<sup>21</sup> Scharf, *supra* note 16, at 1073-1074.

cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.<sup>22</sup>

Rule 62*ter* ICTY-RPE, which allows both sentence and charge bargaining, reflects the unique amalgam between adversarial and inquisitorial procedural elements. Following the more judge-dominated proceedings of the continental system, the Tribunal judges are not bound by any plea agreement.<sup>23</sup> Thus, the judges retain ultimate control over the outcome unlike American federal judges who must accept an agreed-upon sentence or otherwise allow a defendant to withdraw his plea.<sup>24</sup> In fact, the Trial Chamber has actually refused the sentence proposal submitted by the Prosecutor in various cases.<sup>25</sup> Whether the discretion given to Tribunal judges to pull this “emergency brake” will have a chilling effect on the use of plea-agreements is difficult to say.

*b) ICC: Admission of Guilt*

The Rome Statute, which was signed before the ICTY introduced Art. 62*ter* ICTY-RPE, contains a trial-avoidance mechanism resembling American plea-bargaining. However, Articles 64(8) and 65 of the Rome Statute neither contain the term “guilty plea” nor the civil law notion of “confession,” but rather use the expression “proceeding on an admission of guilt.”<sup>26</sup> The wording chosen was mainly a reaction to the rift between the proponents and the opponents of an

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<sup>22</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 2 (Oct. 7, 1997).

<sup>23</sup> Art. 62*ter* (B) ICTY-RPE.

<sup>24</sup> Combs, *supra* note 3, at 145.

<sup>25</sup> See *Prosecutor v. Nikolić*, Case No. IT-94-2, ¶ 35 (Feb. 4, 2005) (judgment on sentencing appeal) (appealing Trial Chamber’s sentence of 23 years imprisonment despite prosecutor’s request that accused only serve 15 years of imprisonment).

<sup>26</sup> Interestingly, the term “to plead not guilty” is used in Article 64(8) Rome Statute to describe a non-admission of guilt.

American-style plea-bargaining system during the preparatory stages of the Court.<sup>27</sup> Additionally, other measures were used to accommodate concerns by civil law lawyers. According to Professor Schabas, “erroneous notions by some European lawyers about common law procedure resulted in the addition of a totally superfluous provision, Article 65(5), to reassure them that plea negotiations could not bind the Court.”<sup>28</sup> This provision, however, may not be as superfluous as it seems. As Judge Cassese stressed in his dissent in *Erdemović*, “legal constructs and terms upheld in national law should not be automatically applied in international law.”<sup>29</sup> The simple fact that in some countries practicing plea-bargaining the courts are not bound by the plea-agreement does not mean that this will automatically be the practice of international criminal courts.

As will be discussed below, there is a potential conflict between encouraging and rewarding plea agreements and the victim’s interests. Article 65(4) of the Rome Statute may reconcile these interests by allowing the Trial Chamber to require the production of additional evidence, including testimony of victims. The Trial Chamber may even order the trial to proceed under ordinary trial procedures if a more complete presentation of the facts of the case is required in the interest of justice and, in particular, in the interests of the victims. This provision could be aimed at situations where a bargain between the accused and the prosecutor is made and where sentencing would not give full considerations to the rights and interests of victims.<sup>30</sup> Whether this provision will create a desirable balance of interests in the ICC will only be answered once the court is faced with such a situation.

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<sup>27</sup> Bohlander, *supra* note 9, at 157.

<sup>28</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 150 (2d ed. 2004).

<sup>29</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶ 2 (Oct. 7, 1997) (separate and dissenting opinion of Judge Cassese).

<sup>30</sup> Schabas, *supra* note 28, at 174.

### III. Plea-Bargaining in the Light of the Goals Pursued by International Justice

#### A. The Mandate of International Criminal Courts

In the domestic sphere of criminal law, a variety of theoretical frameworks for explaining and justifying prosecution and punishment exist. The commonly cited purposes served by criminal proceedings are retribution/vengeance, deterrence/prevention, rehabilitation, and restorative justice.<sup>31</sup> International criminal courts have a mandate reaching beyond these traditional goals due to the special nature of these institutions and the extraordinary evil with which they must deal.

Both the ICTR and the ICTY were established under the Chapter VII powers of the Security Council, which characterized the situations in the former Yugoslavia and Rwanda as a threat to international peace and security.<sup>32</sup> In establishing these institutions, the Security Council found them to be a means to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them” and was convinced that they “would contribute to the restoration and maintenance of peace.”<sup>33</sup> Other important functions of these courts are the search for truth and the creation of a historical record, which may forestall denials and end cycles of violence by identifying a particular individual’s culpability, rather than accusing entire groups: “Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and

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<sup>31</sup> For a critical assessment of transposing these goals of domestic criminal justice to the context of international justice, see Mirjam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

<sup>32</sup> See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 2 U.N. Doc. S/RES/808 (1993) (addressing the ICTY); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1 U.N. Doc. S/RES/827 (1993) (addressing the ICTY); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 1 U.N. Doc. S/RES/955 (1994) (addressing the ICTR).

<sup>33</sup> S.C. Res. 808, at ¶¶ 5-6.

religious hatreds and begin the healing process.”<sup>34</sup> Finally, from a victim’s perspective, the proceedings can provide a forum where their stories can be heard and their loss and suffering acknowledged, possibly even resulting in compensation, restitution, or reparations.<sup>35</sup>

As a general rule,<sup>36</sup> the use of plea-bargaining bypasses the proceedings on the merits and the sole remaining issue is the imposing of an appropriate sentence. Can the unique goals of international justice nevertheless be realized? Or is plea-bargaining incompatible with the mandate of international criminal courts? The following section provides an overview on the range of answers to these questions.

## B. The Compatibility of Plea-Bargaining with the Goals of International Justice

### 1. Plea-Bargaining: A Perforation of the Historical Record?

#### a) *Why the Truth Matters and Whether a Tribunal Can Establish It*

One goal of international criminal proceedings is to create an accurate historical record of wide-scale violations of international law. The establishment of this truth is important in order to lift the veil of silence from painful and contentious periods of history where denial has often been pervasive.<sup>37</sup> It is the official acknowledgment of events and patterns of violence that helps to preclude denial and revisionism in the future. The chief prosecutor of the Nuremberg trials, Justice Jackson, emphasized that the most important legacy of these trials was that they documented Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders

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<sup>34</sup> U.N. SCOR, 48th Sess., 3217<sup>th</sup> mtg. U.N. Doc. S/PV.3217 (May 25, 1993) (statement by U.S. Representative Mrs. Albright).

<sup>35</sup> Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT’L CRIM. JUST. 427, 428 (2004).

<sup>36</sup> Art. 65(4) of the Rome Statute foresees that the trial can be continued notwithstanding a guilty plea when a more complete presentation of the facts is required in the interest of justice.

<sup>37</sup> See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 24-27 (2001).

can arise among informed people.”<sup>38</sup> Finally, international criminal tribunals provide a *common* history that hopefully helps build bridges over rifts in conflict-ridden societies.

Many argue that trials are not effective to expose the truth because they are limited in finding whether the criminal standard of proof has been satisfied on specific charges. Even though a measure of truth may emerge from the criminal proceedings, trials are limited in their truth-finding ability since they must comply with rules of evidence, which often exclude important information.<sup>39</sup> It is true that in domestic criminal proceedings the “law puts a magnifying glass on the criminal’s conduct, leaving only a small and often distorted image of everything else.”<sup>40</sup> But because of the nature of the crimes heard before international tribunals, in contrast to a typical criminal proceeding, the proof of the “chapeau elements” of these crimes requires the establishment of more than simply the accused criminal’s conduct.<sup>41</sup> For example, to convict an individual under genocide, the Court must establish the intent to destroy a substantial portion of the civil population. Likewise, to prosecute for grave breaches under the Geneva Conventions, the prosecution must prove that the offenses took place in the context of an armed conflict. The distinctive feature of crimes against humanity is a widespread and/or systematic attack against the civilian population. Even though the basic crime might be very limited, the proof established during trial proceedings of the larger context in which it is committed, which makes the crime an international one, can contribute to the establishment of the historical record.

Although the historical record established by a tribunal dealing with international crimes might be more important than a record created by courts prosecuting “ordinary” crimes, a Truth

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<sup>38</sup> Scharf, *supra* note 16, at 1078 (quoting *Report to the President from Justice Robert H. Jackson*, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, 7 June 1945, *reprinted in* 39 AM. J. INT’L L. (Supp. 1945), at 178).

<sup>39</sup> Hayner, *supra* note 37, at 100.

<sup>40</sup> Damaška, *supra* note 12, at 1031.

<sup>41</sup> *Id.* at 1031-1032.

and Reconciliation Commission might provide a broader focus and experience fewer constraints in receiving testimony. On the other hand, the facts established by a court might exhibit a heightened legitimacy since they are the product of an adversarial and contradictory trial wearing the tight corset of procedural and evidentiary rules.

*b) Does Plea-Bargaining Undermine the Aspiration of Courts to Establish the Truth?*

The ICTY regards the establishment of the truth as an important aspect of its mandate. As the Trial Chamber expressed in *Erdemovic*,

The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and *establishing the truth* behind the evils perpetrated in the former Yugoslavia.<sup>42</sup>

The ICTY considers that the use of plea-bargaining does not hinder the establishment of the truth, and in fact, it has repeatedly affirmed that guilty pleas are an important and direct contribution to the truth-finding function of the Tribunal.<sup>43</sup> The ICTY's main argument in support of its position is that a plea agreement renders it more likely that the concerned people will accept the historical record,<sup>44</sup> as there is a profound difference between facts found by a judge and facts admitted by an accused, specifically with regards to the method of how the facts are obtained and their potential for promoting reconciliation.<sup>45</sup> For example, an accused that maintains his innocence even after the end of the proceedings would set the stage for endless debates about the correctness of the Court's historical record, whereas an "admission of guilt proffered by a defendant with such sterling nationalist credentials as the Serbian Iron Lady ...

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<sup>42</sup> *Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis, ¶ 21 (March 5, 1998) (sentencing judgment) (emphasis added).

<sup>43</sup> *See Prosecutor v. Sikirica*, Case No. IT-95-8-S, ¶ 149 (Nov. 13, 2001) (sentencing judgment); *see also Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 76 (Dec. 2, 2003) (sentencing judgment).

<sup>44</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 72 (Dec. 2, 2003) (sentencing judgment).

<sup>45</sup> Combs, *supra* note 3, at 149.

provides strong evidence to counteract the self-serving histories that still hold sway among Serbs.”<sup>46</sup>

The question is what kind of historical record is more desirable for international tribunals to establish: a negotiated historical record that is generally acceptable or an accurate one, where some might have to bite the bullet of a harsh judgment. The search for the “whole truth” is the more desirable alternative since only an accurate and solid historical record will endure and prevent revisionist tendencies. Thus, a thorough examination of evidence in proceedings on the merits is necessary given that “agreement and compromise are as unreliable paths to fact-finding accuracy in adjudication as they are in other fields.”<sup>47</sup>

Several aspects of plea-bargaining seriously impoverish the search for the “whole truth.” First, the Trial Chamber admitted in *Nikolić* that “[i]n cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a ‘bargaining’ chip.”<sup>48</sup> The Trial Chamber thus emphasized the importance of considering the “totality of an individual’s criminal conduct,”<sup>49</sup> but it is nevertheless disposed to make compromises on the legal qualification of this conduct. A common bargaining pattern consists of dropping the genocide count in exchange for an admission of guilt for a crime against humanity for the same fact pattern.<sup>50</sup> But even in cases where the factual basis underlying the conduct charged is not reduced by a plea agreement, the importance of the legal qualification of this conduct should not be underestimated. Not only might the stigma attached to genocide (the crime of crimes) be greater compared to a conviction

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<sup>46</sup> Nancy Amoury Combs, *Prosecutor v. Plavšić*, 97 AM. J. INT’L L. 929, 936 (2003).

<sup>47</sup> Damaška, *supra* note 12, at 1032.

<sup>48</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 63 (Dec. 2, 2003) (sentencing judgment).

<sup>49</sup> *Id.* at ¶ 65.

<sup>50</sup> *Prosecutor v. Plavšić*, Case No. IT-00-39&40-PT, Plea Agreement, ¶ 9 (Sept. 30, 2002).



for war crimes or crimes against humanity, but dropping the genocide charge might also erroneously be perceived as an admission by the Prosecutor that this crime did not take place and, hence, ultimately facilitate denial.

Furthermore, the establishment of truth might be hampered due to the considerably poorer historical trace that plea-bargaining leaves behind compared to full-fledged proceedings. The ICTY's practice of letting the accused that is pleading guilty sign a factual basis of a few pages is only the "merest bare-bones history" of the accused's involvement in the crimes compared to judgments that often exceed hundreds of pages and are built upon ample evidence.<sup>51</sup> Finally, the question of whether a bargained truth is better received than one established through criminal proceedings might depend on the addressee. For example, a victim might perceive his tormentor's guilty plea as a result of a clever risk assessment serving the self-interest of the accused rather than a result of establishing the truth in order to lay the foundation for dialogue and reconciliation.<sup>52</sup>

## 2. Is Plea-Bargaining Reconcilable with the Nature of the Crimes and the Duty to Prosecute?

To put an end to the impunity of perpetrators of war crimes, genocide, and crimes against humanity through their effective prosecution is the paramount goal of every international criminal tribunal. Crimes prosecuted by international criminal courts belong to the most reprehensible forms of criminality. The extraordinary evil they incarnate affects the desirability of plea-bargaining before international instances in a negative way. Many national procedural laws reflect the principle that the more serious the crimes allegedly committed, the more

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<sup>51</sup> Scharf, *supra* note 16, at 1080.

<sup>52</sup> Combs, *supra* note 3, at 148-149 (stating that empirical studies in the domestic context indicate that good judgment of the risks and self-interest inspire most of the guilty pleas, not honesty, responsibility, or any other virtue).

appropriate it is for the perpetrators to be subject to imposed rather than negotiated justice, and in cases of the most serious crimes, they do not allow bargained outcomes at all.<sup>53</sup> How can plea-bargaining be justified *a fortiori* in the realm of international justice? Is plea-bargaining reconcilable with the duty to prosecute and to impose a sentence proportionate to the gravity of the criminal conduct?

a) *Duty to Prosecute: An Obstacle to Plea-Agreements?*

When Judge Cassese presented the initially adopted Rules of Procedure and Evidence of the ICTY, he stressed that no one should be immune from prosecution for crimes of such magnitude; therefore, plea-bargaining had not found its way into the Rules.<sup>54</sup> Immunity in fact collides with the duty to prosecute and to impose effective sentences. This duty is namely laid out in the 1948 Genocide Convention, which requires prosecution and effective penalties for the crime of genocide.<sup>55</sup> The four Geneva Conventions oblige the High Contracting Parties to prosecute grave breaches of the Conventions and to enact effective penal sanctions.<sup>56</sup> Customary international law also requires the investigation and prosecution of war crimes.<sup>57</sup>

The duty to prosecute does not extinguish prosecutorial discretion entirely. In light of limited resources, the Prosecutor must carefully choose which suspected perpetrators to prosecute as well as what to charge them with. But in cases where the Prosecutor indicts a person for genocide, approving a plea agreement and dropping this grave charge simply to

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<sup>53</sup> Damaška, *supra* note 12, at 1032.

<sup>54</sup> See Statement by President, *supra* note 17.

<sup>55</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948, arts. 1, 5, & 6, 9, 78 U.N.T.S. 277.

<sup>56</sup> Art. 49 G.C.I, Art. 50 G.C.II, Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 76 U.N.T.S. 135; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>57</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW, Vol. I: Rules 607-611 (2005).

expedite the caseload seems incompatible with the duty to prosecute.<sup>58</sup> Indictments for genocide are not issued out of the blue. The Prosecutor must first demonstrate that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed this crime, and then the charge must also be confirmed by a judge.<sup>59</sup> Once this *prima facie* case for the most reprehensible crime is established, Art. 4 and 5 of the Genocide Convention demand its prosecution and punishment. To sacrifice a count of genocide for judicial economy seems incompatible with the spirit of this international treaty.

Some argue that the statutes for the ICC and the *ad hoc* Tribunals only incorporate the substantive provisions of the Geneva Conventions and the Genocide Convention and not the procedural aspects of the treaties that require prosecution and punishment. Thus, because the international courts have a juridical personality independent from the states that ratified these conventions, the obligation to prosecute does not follow.<sup>60</sup> There is, however, a response to this argument. States have a duty to prosecute international crimes based on various treaties and by virtue of international customary law. According to international customary law, states may discharge their obligation to investigate and prosecute the suspects by setting up international or mixed tribunals.<sup>61</sup> Based on the principle that the sum of rights and obligations imposed on a state must not be diminished through delegation, both the substantial and the procedural content of these conventions must migrate to the international level. Furthermore, the very reason for which international tribunals are created - to assure prosecution in cases where a state is not able or willing to realize its duty to prosecute - contradicts the proposition that this principle should not be applicable in the realm of international justice.

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<sup>58</sup> Scharf, *supra* note 16, at 1075.

<sup>59</sup> See Art. 47 ICTY-RPE.

<sup>60</sup> Scharf, *supra* note 16, at 1075.

<sup>61</sup> Henckaerts & Doswald-Beck, *supra* note 57, at 610.

b) *Plea-Bargaining Despite the Nature of the Crimes and the Duty to Prosecute?*

At first, the ICTY only used sentence bargaining, but *Plavšić* permitted charge bargaining for the first time in the ICTY's existence. In *Plavšić*, the accused had served as a deputy to Bosnian Serb leader Radovan Karadžić and had been charged with two counts of committing genocide and complicity in genocide and six counts of committing crimes against humanity against Bosnian Muslims. In exchange for her guilty plea on one count of persecution (a crime against humanity), all other charges were dropped.<sup>62</sup> Following this landmark case, there have been other convictions on lesser counts than genocide in exchange for guilty pleas.<sup>63</sup> The ICTY, however, is not insensitive towards the problems that arise from the practice of charge reduction and states that any negotiation on a charge of genocide or crimes against humanity "must be carefully considered and be entered into for good cause" because of the prosecutor's duty to prosecute serious violations of international humanitarian law and the fundamentally different nature of the crimes within its jurisdiction compared to those prosecuted nationally.<sup>64</sup> The ICTY then goes on to distinguish between situations in which the remaining charge(s) still reflect the totality of an individual's criminal conduct and those where the plea agreement simply reflects what the parties perceive as a suitable settlement of the matter by blinding out substantial parts of the indicted's criminal conduct.<sup>65</sup> As a reconciliatory position, the ICTY concludes that, in the latter case, charge dropping would spurn the goals of international justice, but it

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<sup>62</sup> *Prosecutor v. Plavšić*, Case No. IT-00-39&40-PT, Amended Consolidated Indictment (March 7, 2002); *Id.* (Dec. 20, 2002) (decision granting prosecution's motion to dismiss counts 1, 2, 4, 5, 6, 7 and 8 of the amended consolidated indictment).

<sup>63</sup> See, e.g., *Prosecutor v. Obrenović*, Case No. IT-02-60/2-2 (Dec. 10, 2003) (sentencing judgment); *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S (Dec. 2, 2003) (sentencing judgment).

<sup>64</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 65 (Dec. 2, 2003) (sentencing judgment).

<sup>65</sup> *Id.*

nevertheless allows for the withdrawal of charges in the former case, i.e. where the totality of criminal conduct is taken into account.<sup>66</sup>

The ICTY's practice of taking into account the totality of criminal conduct but convicting only for a lesser crime raises another question: Whether there is a duty to prosecute international crimes under *all* permissible legal characterizations once the underlying facts are established?<sup>67</sup> It is true that the relationship between the different crimes is not authoritatively established in international law, but as an analogy to national criminal law, priority should be given to the most serious crimes, regardless of whether the same factual allegation can be prosecuted cumulatively under a further charge. When certain conduct is solely prosecuted under the title of war crimes or crimes against humanity rather than genocide, this might reflect the totality of the defendant's *acts* but it might not fully mirror their *degree of unlawfulness*. This situation, in turn, renders it impossible for the court to impose a penal sanction fully reflecting the seriousness of the crime and the degree of culpability.<sup>68</sup> Therefore, the ICTY's admission of charge bargaining in cases where the totality of the defendant's acts is reflected, but not where the degree of unlawfulness is fully mirrored, might be questionable.

In some cases before the ICTY, it was contended whether the plea agreement would reflect the totality of an individual's criminal conduct. In the sentencing judgment following the plea agreement in *Deronjić*, Presiding Judge Schomburg dissented mainly because the factual basis contained in the plea agreement provided an arbitrary, selective account of the facts and did not reflect the defendant's participation in the much larger criminal plan of ethnic cleansing.<sup>69</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> Bohlander, *supra* note 9, at 156.

<sup>68</sup> Ralph Henham, *The Ethics of Plea Bargaining in International Criminal Trials*, 26 LIVERPOOL L..R. 209, 217 (2005) [hereinafter Henham, *Ethics of Plea Bargaining*].

<sup>69</sup> *Prosecutor v. Deronjić*, Case No. IT-02-61-S, ¶ 4-5, 9 (March 30, 2004) (sentencing judgment, dissenting opinion of Judge Wolfgang Schomburg).

Judge Schomburg's dissent demonstrates that the test developed by the ICTY concerning charge bargaining might pose problems in practice, because it is not always obvious whether the remaining charges accurately reflect the actual conduct and crime committed. If the remaining charges do not, the argument that charge bargaining can violate the duty to prosecute gains momentum.

### 3. Plea-Bargaining from the Victim's and the Accused's Perspective

The paramount goal of international criminal tribunals is to convict and punish those most responsible for committing war crimes, crimes against humanity, and genocide. It is hoped that convictions will contribute to the prevention of these types of crimes, which concern the international community as a whole, by putting an end to impunity for the perpetrators.<sup>70</sup> Furthermore, the tribunals aspire to contribute to the restoration and maintenance of peace through criminal proceedings. By convicting individuals for their crimes, an assumption of guilt can be removed from the collective body they represent, which prevents an entire ethnic or religious group from being held responsible for the conduct of a few individuals.<sup>71</sup>

But does plea-bargaining also carries the risk of convicting innocent people while offering excessive leniency to those bearing responsibility, and thus frustrate the principle of just desert? From the victim's perspective, the fact that covert dealings between the prosecution and defense take place will raise doubts as to whether or not the principle of just desert is realized.<sup>72</sup> As plea-bargaining ultimately leads to avoiding trial, the victims also lose the opportunity to have their voices heard.<sup>73</sup> The question of whether plea-bargaining hampers or furthers the victim's

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<sup>70</sup> See Preamble of the Rome Statute.

<sup>71</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 60 (Dec. 2, 2003) (sentencing judgment).

<sup>72</sup> Bohlander, *supra* note 9, at 162.

<sup>73</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 62 (Dec. 2, 2003) (sentencing judgment).

interests, as well as the accused's, is examined below.

a) *Is Plea-Bargaining an Obstacle to Realizing the Victim's Interests?*

In *Plavsić*, it was argued that the use of plea-bargaining could be advantageous for the victims insofar as it relieves them from the ordeal of giving testimony.<sup>74</sup> Hence, a second traumatization through proceedings could be prevented<sup>75</sup> and the risks resulting from testifying, such as retaliation, would be avoided. A further benefit of plea-bargaining from the victim's perspective can be seen in the potential to obtain judgments within a shorter period of time as compared to the time necessary to conduct a full-blown trial on the merits.<sup>76</sup> The time saved, in turn, would allow the investigation and prosecution of more cases, and thus more victims would have their suffering officially recognized and acknowledged by international tribunals. Finally, it could be argued that victims are, first and foremost, interested in a conviction. So, while the severity of the sentence and the legal qualification of the crime are secondary concerns and plea-bargaining is a means to secure a conviction, its use would nevertheless ensure the satisfaction of at least one of the victim's interests.

These arguments rest on the assumption that victims prefer to avoid participation in trial proceedings and that their interest in the qualitative outcome of a prosecution is limited. This assumption, quite to the contrary, might not be true. Criminological research in domestic systems tends to show that the severity of the sentence matters to the victim and that victims very often want their day in court in order to confront the accused with their grievance. If this applies to ordinary criminality, it follows that it is much truer in the case of the extraordinary evil that is the

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<sup>74</sup> *Prosecutor v. Plavsić*, Case No. IT-00-39&40/1-S, ¶¶ 66, 68 (Feb. 27, 2003) (sentencing judgment).

<sup>75</sup> Bohlander, *supra* note 9, at 161.

<sup>76</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 67 (Dec. 2, 2003) (sentencing judgment).

subject of proceedings before international courts.<sup>77</sup> From a victim's perspective, a criminal trial can restore and promote a sense of agency, i.e. the impression that a certain control over the acts and events that affected them can be exercised - especially when that sense was destroyed by the very conduct constituting the object of the indictment. Egregious crimes involve not only physical harm but also the denial of dignity, personal integrity, and autonomy. The mere act of reconceptualizing oneself as a participant of a criminal trial and possibly even as the holder of rights<sup>78</sup> can offer a sense of empowerment.<sup>79</sup> This sense of empowerment might be destroyed by the use of plea-bargaining - a covert deal between prosecution and defense with which the victim is not associated. Victims may not understand why their tormentors are allowed to escape public exposure and scrutiny and "hide behind an agreement with the very institution that is supposed to ensure that justice is being done to the victims."<sup>80</sup>

There is a certain tension between the victim's interest in having a full trial for its cathartic effect and the tribunal's interest in encouraging and rewarding guilty pleas. Victims do not dispose of a procedural device to request a full trial in order to have their voices heard if the court is willing to accept the guilty plea.<sup>81</sup> The Rome Statute makes some accommodation for these conflicting interests in Article 65(4), under which the Trial Chamber may request that the prosecutor present additional evidence, including the testimony of witnesses, or even order the trial to be continued under the ordinary trial procedures if it is "of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular in

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<sup>77</sup> Bohlander, *supra* note 9, at 162.

<sup>78</sup> E.g., Rome Statute, art. 75 (reparations to victims).

<sup>79</sup> Beth Van Schaak, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. R. 2305, 2318 (2004).

<sup>80</sup> Bohlander, *supra* note 9, at 162.

<sup>81</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 62 (Dec. 2, 2003) (sentencing judgment) (even though witnesses may be called at a sentencing hearing, this is quite rare in practice).



the interests of the victims.”<sup>82</sup> This provision, in conjunction with Article 68(3) of the Rome Statute, which is designed to ensure that the Court allows the “views and concerns” of victims to be presented and considered at any stage in the proceeding where the “personal interests of the victims are affected” raises the hope that victims interests will be given appropriate weight in the decision whether to have a full-fledged trial.<sup>83</sup>

b) *Plea-Bargaining from the Accused’s Perspective: A Mixed Blessing*

From a defendant’s perspective, plea-bargaining is a mixed blessing. Doubtlessly, there are some clear advantages for the accused to enter a guilty plea agreement. According to Judge Cassese, an accused individual may find it beneficial to plead guilty for three reasons.

Firstly, it may help him salve his conscience and atone for his wrongdoing. Secondly, he will avoid the indignity and the possible demoralisation of undergoing a trial, as well as the psychological ordeal he would have to go through during examination and cross-examination of witnesses . . . he will also eschew the public exposure that may ensue from trial, and the adverse consequences for his social position and the life of his family and relatives. Thirdly, the accused may expect that the court will recognise his cooperative attitude by reducing the sentence it would have imposed had there not been a plea of guilty: in other words, the accused may hope that the court will be more lenient in recognition of his admission of guilt.<sup>84</sup>

Moreover, in charge bargaining, a plea agreement gives the accused the ability to admit guilt in exchange for a lesser charge and thereby avoid conviction for a more serious crime.

The downside of all these advantages, however, is their potential to induce an *innocent* accused individual to admit guilt. The prospect of a certain, reduced penalty or the conviction for

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<sup>82</sup> Given that the ICTY is not bound by any agreement between the Prosecutor and the defense, the ICTY could theoretically use its discretion in order to realize the victim’s interests in a specific case in the same way and for the same reasons that Article 65(4) suggests.

<sup>83</sup> Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L. Q. 81, 107-108 (2003).

<sup>84</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶ 8 (Oct. 7, 1997) (separate and dissenting opinion of Judge Cassese).

a lesser charge rather than incurring the risk of a conviction for a more serious crime may especially prompt the risk averse defendant to plead guilty.<sup>85</sup> This problematic feature of plea-bargaining is not unique to its use in the international sphere. The gravity of, and the stigma attached to, the crimes falling in the jurisdiction of international criminal courts, however, amplifies the problem of waiving the right to be presumed innocent and sacrificing the benefit of having the prosecution bear the burden of establishing guilt beyond a reasonable doubt at a public trial.

#### **IV. Drawbacks Outweighed by Securing Administrative Efficiency?**

##### **1. Complexity of Procedure: An Explanation for the Increased Use of Plea-Bargaining**

In the United States, plea-bargaining developed primarily as a response to the introduction of increasingly complex and time-consuming criminal procedures and the soaring docket during the twentieth century. The system was no longer able to try all accused individuals in full-blown trials, thus plea-bargaining was increasingly used to evade those procedures.<sup>86</sup> In 1971, the United States criminal system had become so dependent on this trial avoidance mechanism that the Supreme Court in *Santobello v. New York* designated plea-bargaining as an essential component of the administration of justice which should be encouraged when properly administered.<sup>87</sup> The Court stated that if every criminal charge were subjected to a full-scale trial, the number of judges and court facilities would have to be multiplied by many times.<sup>88</sup>

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<sup>85</sup> Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1079, 2000 (1992) (arguing that innocent defendants are more likely to be risk averse than guilty ones, and therefore, the former are likely to be overrepresented in the pool of “acquittable” defendants who are attracted by prosecutorial offers to plead guilty).

<sup>86</sup> Cammack & Garland, *supra* note 1, at 276; Combs, *supra* note 3, at 8, 12-16.

<sup>87</sup> *Santobello v. New York*, 404 U.S. 257, 260 (1971).

<sup>88</sup> *Id.*

Combs has established a correlation between the complexity of procedures and the prevalence of plea-bargaining: the more complex and costly the criminal proceedings are the more often plea-bargaining will be used to evade those procedures.<sup>89</sup> Indeed, procedures before international tribunals are complex and very time consuming. This is in large part due to the difficulty inherent in the proof of the “chapeau elements” of genocide, war crimes, and crimes against humanity. For example, to establish that a basic crime such as murder was committed as a part of a systematic and widespread attack goes far beyond what must be proven in a trial concerning ordinary criminality.<sup>90</sup> But also, collecting evidence is more arduous and time consuming as the court is not situated at the *locus delicti* and does not have the same arsenal of subpoena measures as a national court equipped with a proper police force. Furthermore, the likelihood that victim and witness protection measures are necessary is greater than in the average domestic procedure. Finally, different logistical measures such as translation into several languages and the transportation and hosting of witnesses and victims are not only costly but also very time consuming.<sup>91</sup> Hence, in the light of the correlation proposed by Combs, the use of plea-bargaining by international courts does not come as such a surprise. The ICTY, however, has provided a much different explanation for its use of plea-bargaining after having initially rejected its introduction in the ICTY-RPE.

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<sup>89</sup> Combs, *supra* note 3, at 8.

<sup>90</sup> Scharf, *supra* note 16, at 1077.

<sup>91</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ¶ 8 (Oct. 7, 1997) (separate and dissenting opinion of Judge Cassese).

2. Explanation Provided by the ICTY: Furthering the Mandate or Administrative Efficiency?

In various sentencing judgments, the ICTY has considered saving time and resources as a valuable and justifiable reason for the promotion of guilty pleas. The mechanism of the guilty plea was praised for “securing administrative efficiency,”<sup>92</sup> “substantial saving of international time and resources,”<sup>93</sup> and saving “the International Tribunal the time and effort of a lengthy investigation and trial.”<sup>94</sup> Hence, the main justification, or at least a major justification, given by the Tribunal for the use of plea-bargaining is administrative efficiency.

But in *Nikolić*, the Trial Chamber tried “to divorce itself from the administrative efficiency argument.”<sup>95</sup> In this first principled discussion of plea-bargaining, the Chamber wrote that it could not fully endorse the argument that saving time and resources would be a valuable and justifiable reason for the promotion of guilty pleas.<sup>96</sup> Given the magnitude of the cases and the fact that the Tribunal was entrusted by the international community to bring justice to the former Yugoslavia, saving resources could not be given undue consideration or importance. Considering that the quality of justice and the fulfillment of the mandate should not be compromised and that its very *raison d’être* would be to conduct criminal proceedings, the Tribunal came to the conclusion that “while savings of time and resources may be a *result* of guilty pleas, this consideration should not be the main *reason* for promoting guilty pleas through plea agreements.”<sup>97</sup> This statement raises the question what, if not administrative efficiency, should be the reason for the use of plea-bargaining?

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<sup>92</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 7 (Oct. 7, 1997).

<sup>93</sup> *Prosecutor v. Plavsić*, Case No. IT-00-39&40/1-S, ¶ 73 (Feb. 27, 2003) (sentencing judgment).

<sup>94</sup> *Prosecutor v. Sikirica*, Case No. IT-95-8-S, ¶ 149 (Nov. 13, 2001) (sentencing judgment).

<sup>95</sup> Henham, *Ethics of Plea Bargaining*, *supra* note 68, at 216.

<sup>96</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 67 (Dec. 2, 2003) (sentencing judgment).

<sup>97</sup> *Id.*

In *Nikolić*, the Trial Chamber found “that, on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal.”<sup>98</sup> As plea-bargaining would secure convictions and possibly elicit evidence crucial for other prosecutions, it would lead directly to the fulfillment of a fundamental purpose of the Tribunal.<sup>99</sup> The acceptance of responsibility by the accused as well as the underlying facts established in the case of a plea agreement would make denial no longer possible, and thus another purpose of the court would be fulfilled. Finally, plea-bargaining would also contribute to restoring peace and justice and bring reconciliation, because a guilty plea may be more meaningful to the victims and survivors than a finding of guilt by a trial. Thus, the guilty plea would represent a first step in the reconciliation dialogue.<sup>100</sup>

While I am not able to see behind the curtain of the ICTY, it seems to me that administrative efficiency and judicial economy played a more important role than was admitted in the *Nikolić* Tribunal’s decision to eventually admit plea-bargaining. In my opinion, time and resource savings and case completion were not simply the result but rather the reason for introducing this trial-avoidance mechanism. The timing of its introduction, after the docket had grown considerably and the efficiency and completion discussion was launched,<sup>101</sup> supports this conclusion. Furthermore, the initial rejection of plea-bargaining<sup>102</sup> for the very reason that granting immunity to perpetrators of the most serious crimes would be incompatible with the mandate of the Tribunal renders the justification that plea-bargaining would further the work and

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<sup>98</sup> *Id.* at ¶ 73.

<sup>99</sup> *Id.* at ¶ 69, 71.

<sup>100</sup> *Id.* at ¶ 72.

<sup>101</sup> See *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. GAOR, 54th Sess., Agenda Item 142-43 at 23, 28, 34, 90 U.N. Doc. A/54/634 (1999).

<sup>102</sup> See Statement by the President, *supra* note 17.

mandate of the ICTY less convincing. Finally, the explanation given in the United States and its Supreme Court for the use of plea-bargaining cannot be ignored.

### 3. Balancing of Interests: Mandate versus Administrative Efficiency

Even though the use of plea-bargaining can further the goals of international justice under certain circumstances, this does not seem to justify its increased use, especially in view of its equal or even greater potential to distort and compromise the goals of international courts: the duty to prosecute, the establishment of a historical record, and the realization of the victim's interests. As the Trial Chamber in *Nikolić* stressed, negotiations in criminal proceedings for international crimes should be "carefully considered" and only "entered into for good cause."<sup>103</sup>

Additionally, against the background of the nature of the international crimes, which strike at the heart of peaceful co-existence, the argument of practical utility loses much of its force. It is questionable whether negotiations can be "entered [into] for good cause," if only justified by securing administrative efficiency. The ICTY itself has argued that time and resource savings would not be a valuable and justifiable reason for accepting negotiated outcomes in criminal proceedings, and that only the furtherance of the Tribunal's goals could serve as a legitimate ground for its introduction.<sup>104</sup> But once we conclude that plea-bargaining can compromise these goals, there is no longer a solid justification available for its use.

If we follow Scharf's argument that plea-bargaining is not a functional necessity of international courts, the justification of plea-bargaining with an argument of judicial economy loses even more ground. He argues that plea-bargaining could be avoided by adequately funding

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<sup>103</sup> *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, ¶ 65 (Dec. 2, 2003) (sentencing judgment).

<sup>104</sup> *Id.* at ¶ 73.

and staffing international tribunals.<sup>105</sup> Bohlander also advocates for restrained use of plea-bargaining and states, “If the international community is serious about international criminal prosecution of those responsible for atrocities . . . then it must be prepared to fund this enterprise accordingly in order to be able to afford full public trials and at the same time to avoid overloaded dockets.”<sup>106</sup>

## **V. Conclusion**

An examination of the practice at the ICTY and the normative framework of the Rome Statute reveals that the use of negotiated justice, rather than imposed justice, before international criminal tribunals has become a reality. The use of plea-bargaining entails the risk of compromising the goals and mandate of international criminal courts, which goes beyond the purposes of domestic criminal proceedings mainly consisting of retribution, deterrence, rehabilitation, and prevention. An excessive recourse to this trial-avoidance mechanism not only distorts the historical record and the establishment of truth but also conflicts with the duty to prosecute and the principle of just desert. Finally, plea-bargaining is a mixed blessing for both the victims and the accused. Given all these drawbacks with regard to the mandate of international courts and the weak justification of administrative efficiency on which plea-bargaining rests, I advocate for giving priority to imposed justice rather than negotiated justice. We have seen that judges have a considerable amount of discretion over whether or not to accept plea agreements. Furthermore, the Rome Statute explicitly states that the presentation of additional evidence or even conducting a full-fledged trial can be required if in the interest of justice, and in particular, the victims’ interests. Hopefully, judges will exercise this discretion in

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<sup>105</sup> Scharf, *supra* note 16, at 1080.

<sup>106</sup> Bohlander, *supra* note 9, at 163.

a way that best furthers the goals of these institutions set up for the prosecution of the most reprehensible form of criminality.